No. 296

IN THE

Supreme Court of the United States

October Term, 1944

PANHANDLE EASTERN PIPE LINE COMPANY, ILLINOIS NATURAL GAS COMPANY, AND MICHIGAN GAS TRANSMISSION CORPORATION,

Petitioners,

vs.

FEDERAL POWER COMMISSION, CITY OF DETROIT, COUNTY OF WAYNE, MICH., MICHIGAN CONSOLIDATED GAS COMPANY, AND MICHIGAN PUBLIC SERVICE COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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The argument in respondents' brief presents their contentions under four points. We will reply herein to each of these points in the order stated by respondents.

ARGUMENT.

I.

THE COMMISSION'S FINDING THAT NO ALLOCATION WAS NECESSARY IN THE CIRCUMSTANCES OF THIS CASE WAS ARBITRARY AND UNREASONABLE AND DOES NOT HAVE A SUBSTANTIAL BASIS IN THE RECORD.

Petitioners pointed out in their brief (pages 23-27) that the Commission's former findings are silent on the question of allocation but that its reasons for making no allocation are set forth in its opinion (R. I. 33-34). They pointed out that those reasons form no adequate basis for the Commission's failure to make an allocation but tended, rather, to show the necessity of making an allocation.

Respondents concede (Rep. Brf. P. 12) that "petitioners presented an allocation study (Ex. 251; R. XIII, 5947-5955) through their witness Biddison," and respondents base their entire discussion of allocation on his testimony and exhibits. Respondents make no mention of the fact that the Commission's staff also presented a basis for allocation through the Commission's witness Shattuck (Ex. 263; R. XVI, 6883-6887 and explanatory testimony R. VIII, 3994-4002).

Respondents criticize the result shown by Biddison's allocation of operating expenses. They fail to mention the fact that the Commission's own witness Shattuck, applying a somewhat different method of allocation, reached substantially the same result.

Respondents state in note 8 at page 13 of their brief that Biddison's result "appears even more incongruous in the

light of the fact that petitioners' rates for direct industrial gas in 1941 averaged only 17¢ per MCF, as compared with $1.00 for residential gas, 82.4¢ for commercial gas, and 28.7¢ for gas sold to other utilities." This statement, without explanation, is very misleading. Respondents well know that petitioners have no residential or commercial sales, as such. Respondents derived these figures from a "pro forma" statement of net operating revenue for 1941 in which were included sales by Indiana Gas Distributing Corporation, a local Indiana distributing utility not owned in 1941 by any of petitioners here but owned by Columbia Gas and Electric Corporation. Its sales were included because on or about February 6, 1942, prior to the preparation of this "pro forma" statement, Panhandle Eastern had acquired Indiana Gas Distribution Corporation. On or about July 10, 1942, Panhandle Eastern sold this local utility. If the sales of Indiana Gas Distribution Corporation are eliminated, as they should be, the few remaining so-called "residential" and "commercial" sales of petitioners for 1941 are negligible. In obtaining rights of way and easements in the construction of their transmission line, petitioners were required, in some instances, to agree with the owner of the land that he would be provided with gas from the line for his own use. R VII, 3216-3217 As a result, they are serving such scattered rural customers and employees occupying company houses along the line throughout the eight states through which it passes, but the total revenue from such sales in 1941 was only $9,446.77. The sales designated as "commercial" amounted to only $290.39 (R. XII, 5459).

The purpose of the attack on Biddison's allocation seems to be to create the impression that the Commission considered Biddison's evidence and concluded that it was not reliable. The plain fact is, however, that the Commission's

opinion and its findings make no mention of this evidence or the testimony and exhibits of Commission's witness Shattuck. One of the principal points which petitioners make is the defect in the administrative process by reason of the Commission's *failure to make proper findings on the evidence before it* and the lack of support in the evidence for the Commission's finding that $5,094,384 of petitioners' consolidated gross revenue for 1941 *was available for rate reduction.*

The essence of the order was the requirement that petitioners consolidated gross revenue be reduced by that amount. The fact that the order requires that the reduction be reflected only in rates for gas sold for resale is of minor significance.

The inquiry is directed to the administrative process by which the Commission reached its basic finding that $5,094,384 was available for rate reduction. Respondents admitted in the court below that the Commission treated petitioners' business as subject to the Commission's rate-making powers in its entirety. They said (page 60 of their brief on original argument):

> What the Commission did was to treat the business as a unit, eliminating only the profit *in excess* of a 6½% return on petitioners' entire business (R. 33-34). Under the Commission's order petitioners are allowed a 6½% profit (return) *on all* gas sales, both regulated and unregulated.

The record shows that the Commission had before it evidence of (a) the exact amount of the unregulated sales, (b) the volume of unregulated sales, (c) the exact facilities, and the value thereof, used exclusively in the service of the unregulated sales, (d) the exact facilities, and the value thereof, used exclusively in the service of the regulated sales, (e) a proposed allocation of operating expense sub-

mitted by petitioners, and (f) a proposed allocation of operating expense submitted by the Commission's own staff. This, we think, shows clearly that the Commission's refusal to make an allocation was arbitrary and unreasonable.

Respondents say, however, that, in any event, petitioners were not injured. Petitioners have shown in their brief (pages 29-38) that they were injured, and the point is illustrated with computations from different approaches. We will not restate them here. It will be seen that there is nothing in the quotation from petitioners' brief before the Commission, mentioned in note 13 on page 19 of respondents' brief, inconsistent with petitioners' position here.

II.

THE ABSENCE OF A FORMAL ALLOCATION IN THE INSTANT CASE DOES INVALIDATE THE COMMISSION'S ORDER.

We accept the negative of respondents' point as stated in their brief, but we fail to see the significance of the use of the phrase "a formal allocation," since it is conceded here that no allocation, formal or otherwise, was made by the Commission.

The fact that "The Act does not in terms require an allocation" is of no significance. The controlling fact is that the Act marks out the boundary of the Commission's rate-making powers and excludes from such powers petitioners' direct industrial sales. It does not follow that, as respondents say at page 21 of their brief, "Congress rather obviously left the problem of allocation to the expert judgment of the Commission." No authority is cited for the proposition that a segregation of property or an allocation

is not necessary unless the statute which is the source of the regulatory body's authority specifically requires it.

The fact that Congress, as respondents say, page 21 of their brief, "could have provided for the same regulation over direct industrial sales as it did for interstate sales for resale" does not aid their argument in the slightest degree. Congress expressly provided that "the same regulation" should not apply to both. We have no quarrel with the proposition, stated in note 14, page 21, of of respondents' brief, that petitioners' direct industrial sales are not subject to state regulation. Our point is that they were not made subject to the rate-making powers of the Commission under the Natural Gas Act.

In note 16 on page 23 of respondents' brief, respondents, challenging our statement that it is immaterial whether that part of the business of a natural gas company which is not subject to regulation by the Commission is operated at a loss or at a high profit, say:

> A loss might burden the 'regulated' business and a high profit might well be evidence that the 'unregulated' business is not bearing its proper share of the costs.

This very possibility is one of the impelling reasons why courts have held that there must be a separation between the regulated business and the unregulated business where the two are conducted as parts of the same enterprise.

Respondents' further argument that the order requires only a reduction in the rates for resale gas is of no significance here. The injury to the petitioners arises out of the finding that \$5,094,384 of their 1941 gross consolidated revenue was *available for rate reduction* and the requirement that they reduce their revenue by that amount.

Judge Riddick, dissenting below, held that an allocation was necessary in order that the Commission might stay within the confines of its statutory authority. We think that he was right. The only case cited by respondents in support of their argument *contra* is *Lone Star Gas Company v. Texas*, 304 U. S. 224. That case, however, is not in point. The ruling of the court was based on its determination that all of the properties of Lone Star Gas Company valued by the Railroad Commission of Texas in fixing the rates complained of were devoted to the infrastate transactions subject to the Commission's jurisdiction and there was no interstate commerce as to which segregation could be required.

All of the other cases relied on by respondents are cited only for the proposition that "a fair division of costs alone is adequate." (Rsp. Brf. P. 27, n. 18). That proposition is vigorously opposed by the petitioners in Number 379, this term. It is not an issue here because, concededly, no allocation or separation of any kind was made. We comment here, however, on the fact that in *Wabash Valley Electric Co. v. Young*, 287 U. S. 488, 495, there was a separation of property and, in the two other cases cited, namely, *Banton v. Belt Line Railway Corporation*, 268 U. S. 413, and *Houston v. Southwestern Telephone Co.*, 259 U. S. 318, the attack was directed to the result of the allocation and not any failure to make a separation of property as between the regulated and the unregulated.

Finally, under this point, respondents urge that the necessity of an allocation disappears if no confiscation is shown. We challenge this proposition and we submit that it is fundamentally unsound. Like the substantial evidence rule, the question of confiscation can be reached only *after* the statutory standards have been applied. We rely upon the holding of this court in *United States, et al. v. Carolina*

Freight Carriers Corporation, 315 U. S. 475, wherein Mr. Justice Douglas said:

> Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence.

Respondents place great reliance upon certain remarks of Panhandle Eastern's president to the effect that allocation of cost of service was "theoretical," "unrealistic" and "not practical." (Rsp. Brf. P. 16, 28 n. 19). These remarks were mentioned by the Commission in its opinion (R. I, 34) and by respondents in their briefs below. We fail to see what legal significance such remarks can have in determining the question at issue here but, since respondents appear to lay such emphasis upon them, we ask that the court read the portion of the testimony forming the context from which these remarks were lifted. It will be seen that these remarks were made in criticism of the method of allocation adopted and applied by the Commission in the case of *Colorado Interstate Gas Company*, now under review in Number 379, this term.

In support of their argument that there was no confiscation by reason of the failure to allocate, respondents rest on the proposition that, if the return allowed be reduced by $331,000, "the remaining return would be $4,032,925, slightly in excess of a six per cent rate of return on the overall rate base" (Rsp. Brf., p. 29). They insist that an allowance of only six per cent as a rate of return would not be confiscatory. The defect in this argument lies in the fact that the Commission has not found that a six per cent rate of return on the rate base would provide a fair and reasonable return and, if the Court undertakes to make such a determination here, it will be departing from the judicial

function and engaging in the legislative function of rate-making.[1]

In the case of *Lone Star Gas Company* v. *Texas*, 304 U. S. 224, relied upon by respondents, the facts were different. There, the Railroad Commission of Texas had found that a six per cent rate of return was "a minimum fair rate of return." The jury found that the rates fixed by the Commission were confiscatory. Upon review, this court held that it was error for the Texas Appellate Court to disturb the finding of the jury.

III.

THE COMMISSION EXCEEDED ITS JURISDICTION WITH RESPECT TO PETITIONERS' PRODUCING AND GATHERING FACILITIES.

Respondents assert that petitioners raised the issue as to the jurisdiction of the commission over petitioners' producing and gathering facilities for the first time in petitioners' reply brief in the Court below. While we submit that this issue, being a question of jurisdiction, can be raised at any time in the course of the proceedings, nevertheless, the record shows that petitioners presented their case before the Commission on alternative theories, either that the Commission should, on the basis of all of the evidence before it, separate petitioners' production and gathering properties or, in valuing them for rate making purposes, should recognize their status as unregulated properties. Furthermore, we think that petitioners' position in this respect was preserved by their specifications of error in the petition for re-hearing filed with the Commission (specification numbered 11, R. XVI, 7142) and in their

[1]See argument and authorities cited in petitioners' brief, pages 43-45.

petition for review in the Court below (assignment of error numbered third, R. I, 7-8).

The issue drawn between petitioners and the respondents under this point resolves itself into a question of statutory construction. We point out in our brief (pages 47-48) that the legislative history indicates clearly that Congress intended by the Natural Gas Act to regulate the *service* of transporting gas to interstate markets for resale there and not the field price of gas as a *commodity*.

The legislative history in this regard is fully discussed in the brief of the Independent Natural Gas Association of America, *amicus curiae* in *Canadian River Gas Company* v. *Federal Power Commission, et al.*, No. 380, this term. We will not burden the Court here with a repetition of what is said there, but we respectfully refer the Court to that brief for a full discussion of the subject.

In the *Natural Gas Pipe Line Company* case, 315 U. S. 575, and the *Hope Natural Gas Company* case, 320 U. S. 591, cited by respondents, the issue was not raised and the discussion of the legislative history found in the *Hope* case was not directed to the question presented here.

Respondents' statement (Rsp. Brf. p. 35) that "the valuation of production and gathering facilities historically has been an integral part of the regulatory procedure in fixing rates for natural gas" is purely academic here. Such historical background and the cases cited centered around state regulation under statutes which did not contain, as does the Natural Gas Act, a specific provision excluding production and gathering from the regulatory scheme.

Sections 5(b), 6(a), 6(b), 8(a), 9(a), 10(a) and 14(b) of the Act, mentioned by respondents, do not support their contention that the Commission may exercise rate regulatory power over the business of production and gathering.

These sections confer upon the Commission investigatory powers and in no way qualify the express provision of Section 1(b) excluding production and gathering from the application of the provisions of the Act.

IV.

THE COMMISSION CANNOT CONSISTENTLY WITH DUE PROCESS OF LAW, RESTRICT THAT PART OF PETITIONERS' EARNINGS DERIVED FROM THEIR PRODUCING AND GATHERING PROPERTIES TO 6½% ON THE DEPRECIATED ORIGINAL COST OF SUCH PROPERTIES.

Respondents' point IV is stated as follows:

> In determining the reasonableness of petitioners' interstate wholesale rates the Commission is not required to value the gas which they produce 'on the basis of a 'field price.'

The point, as thus stated, is, obviously, too narrow and does not meet the due process issue presented by petitioners' point II in their brief, pages 46-54. Since, however, the discussion under respondents' point IV is directed entirely to that issue we restate it here in replying to respondents' point IV.

Respondents do not challenge the correctness of the computations in Appendix C of petitioners' brief showing a price of 2.8272¢ per MCF allowed petitioners for their gas at the wellhead and an average field price of 3.8336¢ paid by petitioners for all gas purchased in both fields. Respondents assert, however, (Rsp. Brf. p. 47-48, Note 29) that "the allowed cost of gas produced by petitioners averages 3.75¢ per MCF as compared with the 3.71¢ per MCF average cost of gas purchased."

These results are reached by a series of errors in respondent's Appendix B, which we will now proceed to point out:

Price for Purchased Gas.

3.71¢ per MCF is not the average cost of gas purchased in 1941. The correct figure is 3.99¢ per MCF. The error arises in the failure to recognize that royalty gas in the amount of 3,757,377 MCF was purchased in 1941 at approximately 4½¢ per MCF, the total paid being $171,044.

Therefore, to the total purchase price of gas purchased from other producers in the amount of $1,180,918 used in respondents' appendix B must be added $171,044; and to the total volume purchased, namely, 30,137,409 MCF, must be added the 3,757,377 MCF purchased from royalty owners.

The variation between this price of 3.99¢ per MCF and the price for purchased gas shown in petitioners' Appendix C, namely, 3.8336¢ per MCF, is due to the fact that petitioners' Appendix C was based on Exhibit 142, which was six months actual and six months estimated for 1941, whereas actual figures for 1941 show the price of 3.99¢.

It is proper to treat the royalty gas as purchased gas because the nature of a royalty is such that ⅛ of the gas belongs to the lessor at the wellhead. Petitioners purchase all of the royalty gas from their producing wells.

Commission's Allowance for Petitioners' Produced Gas.

The price of 3.75¢ computed in respondents' Appendix B as the allowance to petitioners for their produced gas is incorrect by reason of the following errors:

1. Included in the cost of producing petitioners' gas is the item of $171,044 paid to royalty owners. This item

is not properly a cost of petitioners' produced gas because it is the purchase price of the royalty gas, as explained above. Likewise, the volume of produced gas appearing in respondents', Appendix B namely, 30,059,021, should be reduced by the volume of the royalty gas, to-wit: 3,757,377 MCF, to reach the correct volume of produced gas, namely, 26,301,644 MCF.

2. Included in the cost of producing petitioners' gas (In expenses designated "Gas Well Operation" and "Gas Well Maintenance") are two items which should have been eliminated.

(a). Field Measuring Station Operation and Maintenance Expense amounting to $17,643 (R. XII, 5595);

(b) Supervision and Engineering Operation and Maintenance Expense amounting to $18,433 (Part of total Supervision and Engineering Operation and Maintenance Expense of $31,892 is applicable to items which should not be included as part of the cost of producing petitioners' gas).

Thus where $377,542 is shown in respondents' Appendix B, the amount should be $170,422.

3. The allocation (developed in respondents' Appendix B but nowhere to be found in the Commission's opinion or findings or in the record) of $120,300 of administrative and general expense to the operation of wells and leases is not computed correctly. This allocation appears to be based on an apportionment of an item of $841,848 whereby 14.29% thereof is charged to wells and leases and 85.71% thereof is charged to other operation and maintenance. These percentages are derived from the percentage relation of $377,542 to $2,265,152. These two items represent, respectively, production expense and other operation and maintenance expense totalling $3,823,612 less $1,180,918

for natural gas purchased. Included in the figure $377,542 is $171,044 paid for royalty gas and $36,076 ($17,643 + $18,433) also improperly included as explained above (1+2). These, of course, should have been taken out, reducing the figure $377,542 to $170,422. The $36,076 should be added to the figure $2,265,152. If this is done, the resulting percentages are 6.9 and 93.1. If we apply the percentage 6.9 to the item of $841,848, we find that the general and administrative expense allocable to wells and leases is approximately $58,088 instead of $120,300 (adopting this method of allocation developed for the first time in respondents' Appendix B). It may be observed in this connection that it is difficult to believe that the overhead costs of a natural gas pipe line company having a total rate base of approximately $67,000,000 of which only about 3%, or $2,555,472 (Appendix C of petitioners' brief), is invested in leases and wells should be allocated to the extent of 6.9% to such wells and leases.

4. The Depreciation figure of $94,628 determined through use of an average rate for 1941 is incorrect and should have been $164,548 (shown in petitioners' Appendix C). The depreciation rate applicable to petitioners' production properties is stated to be 6% (R. I, 279 and R. V., 2162).

5. The item of production taxes, $52,811, is incorrect as it includes, "Gross Production, Receipts, Etc." (R. XII 5591). The correct amount is $41,551 (R. XI 5031, Lines 13 and 30).

6. The item of $54,142 shown as the federal income tax allocated to wells and leases is incorrect because it is based on the ratio of an assumed return on production properties of $215,672 to the total return; whereas we have shown

in petitioners' Appendix C that the portion of the return actually allowed on the wells and leases was but $166,105. The ratio of the latter figure to the total return allowed is 3.81% and the amount of federal taxes thereby allocable to wells and leases is $41,672.

7. The amount of the return shown in respondents' Appendix B, to-wit: $215,672, is incorrect due to their use of the figure $417,405 instead of the correct figure (shown in petitioners' Appendix C) of $1,090,528 for the reserves for depreciation applicable to gas wells and equipment. As a result, the net investment in wells and leases allowed in the rate base was found by respondents to be $3,318,034, whereas the correct amount is $2,555,472, as shown in petitioners' Appendix C, item (e). Respondents accept this figure as correct in their computations in note 31 at page 49 of their brief.

When adjustments are made to correct all of the above errors in respondents' Appendix B the result shows an allowance for petitioners' produced gas of 3.25¢ per MCF.

Respondents assert that fair and stable field prices would not prevail if the Commission followed a practice of separating production and gathering properties from the rate base and allowing a field price for gas at the point where it enters the interstate transmission system. Nothing envisioned by respondents may be compared with the chaotic results which are bound to follow if the value of gas in the field is determined upon a 6½% rate of return on the original depreciated cost to each individual producer. The hazards and uncertainties of the production and gathering business are such that a wide variation in prices would inevitably result from application of the Commission's formula. This, we think, was well known to Congress and is a further indication of the wisdom of the law makers in

providing that the provisions of the Act shall not apply to production and gathering. It is interesting to note the statement of respondents (Rsp. Brf. p. 49 that

> "Finally, if the commodity price rather than cost were adopted by the Commission there would no longer be any peculiar necessity for treating the gas business as presenting any hazards. As a result, the transmission facilities, which constitute the larger portion of the pipe lines' investment, would be entitled to a lower rate of return than 6½%."

It is suggested in the note to the quoted paragraph that the return allowed on transmission facilities might be limited to 5½% or 6%. This appears to be a concession that, by reason of the difference between the production and gathering business and the service of transportation, the former requires different treatment in the rate-making process than the latter. By the same token, gas leasehold properties require different treatment in arriving at their value for rate-making purposes.

The fallacy of the Commission's valuation formula is demonstrated by the respondents' computations in the same note. If six per cent were allowed on the transmission facilities (and there is certainly sufficient hazard in that business alone to warrant such a return), the $489,015 return on production property would afford only a rate of return of approximately 4.3% on petitioners' production properties if the market value of their gas leaseholds, shown by their excluded evidence to be $8,339,722, is used in the rate base. Such valuation is proper because the theory of respondents' computation is that petitioners are no longer bound by the depreciated original cost valuation of their producing properties.

The argument is made that Petitioners tendered evidence was subject to the same criticism directed to the evidence

dealing with leaseholds, which was *admitted and considered*, in *Dayton Power and Light Co.* v. *Commission*, 292 U. S. 290, 296-301, and respondents refer also to the criticism by this Court of the weight of the evidence of leasehold values which was *heard and considered* in *United Fuel Company* v. *Commission*, 278 U. S. 300.

The *United Gas Company* cases and the *Dayton Power & Light* case can be distinguished on the following grounds:

1. The evidence offered was admitted.

2. Generous valuations, in excess of original cost, had been made below. The Kentucky Commission had allowed over $6,000,000 and the West Virginia court had allowed over $10,000,000 for 137,000 acres. The Ohio Commission had allowed over $7,000,000 for approximately 291,000 acres. Here, the allowance was only $955,000 for approximately 265,000 acres in proven fields far superior in actual production, potential reserves, and possibility of successful drilling.

3. The evidence of value was all based on an assumed quantity of gas underlying the leaseholds, recovered over a period of years, transported to an unregulated market 130 miles away and there sold at 30¢ per MCF. Even so the court said only that the evidence did not have controlling effect. Mr. Justice Cardozo said in the *Dayton Power & Light Co.* case 292 U. S. 290, 301:

> It had no such commanding quality as to apply coercion to the judgment of the appointed triers of the facts and exclude every choice but one.

4. In the *United Gas* case the court pointed out that evidence of market value was lacking. Here, the evidence offered and excluded dealt solely with market value, as more fully shown in the record (R. IX, 4187-4201) and summarized in petitioner's brief, pages 50-51.

The evidence offered in the *Dayton* and *United Gas* cases dealt with leaseholds in the Appalachian area. That area has in the past produced large volumes of gas but the fields in that area are small in size and substantial risks of dry holes exist. Thus in the Commission's opinion in the *Hope* case, 44 P. U. R. (N. S.) 1 the Commission said, with respect to that area,

> "the permeability and porosity characteristics of the region caused isolated pools of natural gas and the company's gas productive properties are intermingled with nonproductive areas and other companies' properties."

Mr. Justice Jackson stated, discussing the same field (320 U. S. 631), that the development risks appear from the circumstances that up to 1928, even in the proven area, 15.7 per cent of the wells drilled had failed to produce in commercial quantities.

The converse of this situation is clearly shown by the record to obtain both as to the Panhandle field and the Hugoton field (the field in which Petitioners own their gas leases). While it is generally assumed that at some point these fields probably are tied together (R. IX, 4196), each field is generally regarded as being an enormous *common reservoir*. Thus, Witness Smith stated that the gas in the Panhandle field is contained in a common reservoir; that the field extends 125 miles in length with an avgrage width of approximately 20 miles; and that, as classified by the Railroad Commission of Texas, 1,085,270 acres produce sweet gas and 372,437 acres produced sour gas (R. VIII, 4104).

With respect to the Hugoton field, Dr. Bartle testified (R. IX, 4161) that, while ultimate limits of the Hugoton field have not yet been definitely determined, he had indi-

cated on his map a large area in which *no dry holes had been drilled.* This area was about 65 miles in length and from 25 to 45 miles in width in the State of Kansas; about 35 miles in length and 30 to 40 miles in width in Oklahoma; and about 30 miles in length and 12 to 30 miles in width in the extreme northern part of Texas. The total field thus outlined contained approximately 2,540,000 acres (R. IX, 4161).

In the early history of both fields Panhandle Eastern acquired acreage in what has been found to be, as a result of subsequent drilling both by it and other producers, choice portions of both fields and has made consolidations of its leases in the areas which are located at the top of the structure (R. III, 1152), areas which will probably be the last portions of the fields to be abandoned (R. III, 1154). The quality of this acreage is reflected in the circumstance that while the average open flow potential (productive capacity) of all wells in the West Panhandle field is only 16,019 MCF, the average open flow potential of Panhandle Eastern's wells in that field is 25,025 MCF daily (R. IX, 4129). In the Hugoton field the reserves of Panhandle Eastern's wells constitute at least an average of the proven area of the field (R. XIII, 1297).

Respondents tacitly concede that petitioners are paying $4\frac{1}{2}$¢ per MCF for gas purchased from their royalty owners, and 5¢ per MCF for gas purchased from the co-owners of the thirty-four wells jointly owned by petitioners and others. They make no answer whatever to the proposition that, where A and B are selling gas from the same well, it is fundamentally unjust and unreasonable to let A charge the consumer 5¢ per MCF and to allow B to charge only $3\frac{1}{4}$¢ per MCF.

CONCLUSION.

For the reasons assigned in petitioners' brief and in this reply brief, we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and that the order of the Federal Power Commission should be set aside.

Respectfully submitted,

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